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No. 93-1672

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEBRA SUE PAHDOPONY, PETITIONER

v.

DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Interior Board of Indian Appeals properly determined that the term "heirs of the body" in a 1965 will did not encompass an adopted child.

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OPINIONS BELOW

The order and judgment of the court of appeals (Pet. App. X-XVIII) is unpublished, but the judgment is noted at 16 F.3d 417 (Table). The order of the district court (Pet. App. VI-IX) is unreported. The decision of the Interior Board of Indian Appeals is reported at 21 I.B.I.A. 222.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1994. The petition for a writ of certiorari was filed on April 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the interpretation of a provision in the 1965 will of a Comanche Indian concerning the disposition of his trust property. Petitioner sought to set aside the decision of the Department of the Interior regarding the construction of the will. The district court upheld the agency's decision, and the court of appeals affirmed.

1. The testator, Frank Nevaquaya Tooahimpah (Tate), was a Comanche Indian living in Oklahoma. With the assistance of a Department of the Interior attorney, the testator in 1965 drafted a will in which he devised specific tracts of Indian trust land to his seven children and four of his grandchildren. Each child received a life estate in certain tracts with a remainder to the "heirs of the body" of that child. Pet. App. XI. The testator died in 1966, and his will was admitted to probate by the Department of the Interior in 1967. *Ibid.*

Under the terms of the will, Lois Tooahimpah Pahdopony, one of the testator's daughters, received a life estate in the 40 acres of property at issue in this litigation, with the "remainder to the heirs of her body." Pet. App. VII. Petitioner, Debra Sue Pahdopony, is the testator's biological great-granddaughter and Lois's grandniece.[1] *Id.* at II. In 1970, four years after the testator's death, Lois adopted petitioner under Oklahoma law. *Id.* at XII. Lois died in 1988, survived by her husband, who subsequently died, and by petitioner. *Id.* at XIII.

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[1] Petitioner's natural mother is Geneva Navarro, who in turn is the daughter of Esther Tooahimpah Brace, Lois's sister and another one of the testator's daughters. Pet. App. II & n.2.

2. After Lois's death, the Department of the Interior reopened the testator's estate for the purpose of allocating the remainder interest in the subject property. After a hearing on the matter, the administrative law judge held that petitioner, Lois's adopted daughter, was not an "heir of her body" and thus could not claim the remainder interest. Pet. App. I-V. The administrative law judge concluded that, at the time of the will's drafting and the testator's death, the phrase "heirs of the body" had a technical and legal meaning excluding adopted children and spouses. *Id.* at II-III. The administrative law judge also determined that the literal meaning of the term excluded adopted children by referring specifically only to those heirs who were "of the body." *Id.* at III. The administrative law judge found no evidence that the testator, who had no adopted children in his family at the time of his death, had intended "heirs of the body" to have a meaning contrary to its common law construction, and ruled that the remainder interest would pass through the residuary clause of the will. *Id.* at III-IV.

On appeal, the Interior Board of Indian Appeals (IBIA or Board) affirmed the administrative law judge's ruling that petitioner was not an "heir of the body" of her adopted mother. *Estate of Frank (Tate) Nevaquaya Tooahimpah*, 21 I.B.I.A. 222 (1992).[2] The IBIA rejected

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[2] The IBIA did reverse the administrative law judge's determination as to the remainder interest under the residuary clause of the testator's will. 21 I.B.I.A. at 228-231. The Board held that petitioner could inherit a portion of the remainder interest in Lois's life estate through the residuary clause, which devised the residue of the testator's estate to "the devisees listed in this will in equal shares." *Id.* at 228-229. The Board ruled that petitioner, as Lois's sole surviving heir at law, was entitled to the 1/11 share of

petitioner's argument that the testator did not understand the technical meaning of the phrase "heirs of the body" as used in his will, which was drafted by an attorney. The Board stated that although the construction of Indian wills is a matter of federal law, the determination of intestate heirs, and the remaindermen in this case, requires reference to state law. *Id.* at 226-227. The Board concluded that under Oklahoma law "heirs of the body" excluded adopted children and that petitioner had not presented any evidence showing that the testator intended otherwise. *Id.* at 224-228.

3. a. Petitioner brought this suit challenging the IBIA's decision. The district court affirmed the Board's decision. Pet. App. VI-IX. The court rejected petitioner's assertion that absent any federal law construing the phrase "heirs of the body," the court should fashion a federal rule mandating that the phrase include adopted children. *Id.* at VIII. The court reasoned that the question in this case is not whether there is a need for such a federal rule, but rather whether the testator, in using the phrase in his 1965 will, intended to limit his devise to biological descendants. *Ibid.* The district court held that "[b]ecause the prevailing position existing at the time of the will's execution and the testator's death construed the phrase to exclude adopted children," the testator's intent was "to limit the remainder interest in the 40 acres to the natural born children of Lois Pahdopony." *Ibid.* (citing cases). Finding no evidence to the contrary, the district court stated that it "cannot rewrite the will to obtain" the result desired by petitioner. *Id.* at IX.

b. The court of appeals affirmed in an unpublished order. Pet. App. X-XVIII. The court recognized that the

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the remainder interest that would otherwise pass to devisee Lois under the terms of the clause.

intent of the testator, determined from the entire will and as of the time the will was executed, governs the disposition of the testator's estate. *Id.* at XIV. The court concluded that the phrase "heirs of the body" has a practical meaning that includes only natural born children, and that by using that term in his will, the testator intended to exclude adopted children such as petitioner from the remainder interest in the subject property. *Id.* at XVII.

ARGUMENT

The court of appeals correctly rejected petitioner's argument that the Department of the Interior erred in construing the term "heirs of the body" in the particular will at issue here to exclude adopted children. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner acknowledges (Pet. 7) that the task of the IBIA and reviewing courts in construing an Indian will is to ascertain and give effect to the intent of the testator at the time the will was executed. See *Estate of Bruning* v. *Commissioner*, 888 F.2d 657, 659 (10th Cir. 1989) (per curiam); *Estate of Paul Wilford Hail*, 13 I.B.I.A. 140, 143 (1985); *Estate of Dorothy Sheldon*, 7 I.B.I.A. 11, 16-17 (1978); see also 4 *Page on the Law of Wills* § 30.6, at 35 (Bowe-Parker rev. 1961) [hereinafter *Page*]. However, petitioner contends (Pet. 5-8, 11-13) that the IBIA and reviewing courts erred in concluding that the testator intended the phrase "heirs of the body" to exclude adopted children.

Certain general principles govern the interpretation of wills, whether Indian or otherwise. First, the testator's intent is to be gathered whenever possible from the words of the will, construed in their natural and obvious

sense. *Estate of Dorothy Sheldon*, 7 I.B.I.A. at 17. Second, if the testator uses words that have a definite and well understood meaning, it is presumed that the testator intended to use them in that sense. 4 *Page* § 30.21, at 138. In addition, where, as here, the testator had a will prepared and drafted by an attorney, there is a strong presumption that technical terms in the will were used intentionally and correctly. *Id.* § 30.3, at 10. Such presumptions concerning the testator's intentions may be contradicted by express statements in the will, or by other facts and circumstances existing at the time the will was drafted. *Id.* § 30.8, at 51-52; *Estate of Dorothy Sheldon*, 7 I.B.I.A. at 16.

The Department of the Interior correctly applied those principles in determining that the testator's devise of the remainder interest in the subject property to the "heirs of [Lois's] body" should not be understood to include an adopted child. At the time of the drafting of the testator's will in 1965, the phrase "heirs of the body" had a technical and practical meaning that did not encompass adopted children.[3] See Pet. App. VIII (district

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[3] The construction of an Indian will is a matter of federal law. See 21 I.B.I.A. at 226 (citing cases). However, the specific phrase "heirs of the body" contained within the will requires reference to some scheme of intestate succession, which is determined by reference to state law. See *id.* at 225-227; 25 U.S.C. 348 (providing that "the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto"). Thus, the Department of the Interior turned to the law of Oklahoma, the State in which the subject property is located, to determine the usual meaning of the phrase "heirs of the body." As the court of appeals found, under Oklahoma law in 1965, the technical meaning of "heirs of the body" excluded adopted children. Pet. App. XIV (citing *Moore* v. *McAlester*, 428 P.2d 266 (Okla. 1967)). That meaning was consistent with the prevailing position in the States generally at the time the will was drafted.

court decision citing authority that the prevailing position existing at the time of the will's execution and testator's death construed the phrase to exclude adopted children); see also 4 *Page* § 34.10, at 424-425 (noting that "[t]he phrase, 'heirs of the body,' in the absence of language indicating a contrary intent, has been construed as not including adopted children"); 2 Am. Jur. 2d, *Adoption* § 98, at 939 (1962) (noting that "use of terms such as bodily heirs, or 'heirs of his body' indicates intention to exclude adopted children, for such phrases ordinarily embrace only lineal blood descendants of the designated person").

Petitioner provides no evidence in support of her contention that the testator would not have intended the phrase to be given its prevailing technical and practical meaning. At the time the will was originally probated, the examiner concluded that the evidence was "clear and convincing" that the will expressed the testator's "true individual testamentary desires." See Pet. C.A. App. 51. The interpreter who assisted the testator and the departmental attorney in drafting the will testified at the probate proceeding that the will "accurately reflect[ed] what [the testator] wanted done." See Pet. App. XV. Nothing in the will or the facts and circumstances surrounding its execution warrants attributing a different meaning to the unambiguous phrase "heirs of the body." The IBIA therefore did not err in determining that the testator intended the phrase "heirs of the body" to exclude adopted children, and

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Therefore, whether the meaning of the phrase turns on state law or on a federal common law rule fashioned on the basis of the prevailing interpretation of the phrase "heirs of the body," the result in this case is the same.

consequently in ruling that petitioner could not inherit the entire remainder interest in the subject property.

2. Petitioner contends (Pet. 8-11) that the IBIA and reviewing courts committed a fundamental error by failing to adopt a "federal substantive rule of construction" that mandates that the phrase "heirs of the body" used in Indian wills encompasses adopted children. No federal court has embraced such a rule, and petitioner's attempts to support her position by reference to federal cases and statutes, as well as regulations of the Department of the Interior, are unavailing. Those authorities were enacted or issued long after the testator's will was executed. They accordingly shed no light on the testator's intent in 1965 in using the precise words "heirs of the body" in his will.

a. Petitioner concedes (Pet. 9) that no federal court has "directly addressed the meaning of the exact term 'heirs of the body.'" In support of her position that adopted children should nevertheless be encompassed within that phrase, petitioner cites two federal cases construing a completely different term. See *Johns* v. *Cobb*, 402 F.2d 636 (D.C. Cir. 1968), cert. denied, 393 U.S. 1087 (1969); *Riggs Nat'l Bank* v. *Summerlin*, 445 F.2d 201 (D.C. Cir.), cert. denied, 404 U.S. 851 (1971). Those cases involved the interpretation of the term "issue" and do not bear on the construction of the more precise term "heirs of the body." In *Johns*, the court noted that because enough uncertainty surrounded usage of the term "issue," it doubted that "a competent draftsman who wanted to exclude adopted children would rely on the word 'issue' alone to express that purpose." 402 F.2d at 637. In contrast, there was a uniform interpretation of the term "heirs of the body" prevailing at the time that the testator in this case drafted his will with the aid of

an attorney. Under that interpretation, the term did not encompass adopted children.

b. Petitioner is also mistaken in asserting (Pet. 10-11) that her position is supported by various federal statutes and regulations that became effective after the testator's death. The Indian Child Welfare Act of 1978 concerns only substantive issues such as the standards governing removal of Indian children from their families and their placement in foster or adoptive homes. See 25 U.S.C. 1901 *et seq.* Nowhere does the Act purport to govern testamentary construction of Indian wills. Nor does it concern intestate succession regarding disposition of Indian lands. Petitioner's reliance upon 25 U.S.C. 372a is similarly unavailing. "Th[at] statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior." *Fisher* v. *District Court*, 424 U.S. 382, 389 (1976). It has no bearing on the interpretation of Indian wills.

The Department of the Interior's regulations concerning Indian probate matters, cited by petitioner, are also inapposite. Section 4.201(k), 43 C.F.R., provides only that the term "child" or "children" as used in departmental regulations includes adopted children. The regulation does not affect any principle of Indian will construction and does not speak to the interpretation of the phrase "heirs of the body" in a will. Section 4.261, 43 C.F.R., the "anti-lapse provision," provides only that adopted children can inherit from a named devisee who predeceases the testator. The regulation does not affect the interpretation of the term "heirs of the body" and does not address the question here.[4]

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[4] Indeed, the IBIA actually applied the anti-lapse regulation in petitioner's favor by finding that she could inherit Lois's 1/11 share

The Department of the Interior was obligated to ascertain and give effect to the intent of the testator expressed some 30 years ago in his will. A public officer reviewing an Indian will may not "substitute his preference for that of an Indian testator." *Tooahnippah* v. *Hickel*, 397 U.S. 598, 608 (1970). "[N]othing * * * vests * * * a governmental official [with] the power to revoke or rewrite a will that reflects a rational testamentary scheme * * * simply because of a subjective feeling that the disposition of the estate was not 'just and equitable.'" *Id.* at 610; see *Ducheneaux* v. *Secretary of the Interior*, 837 F.2d 340, 345 (8th Cir.), cert. denied, 486 U.S. 1055 (1988); *Akers* v. *Morton*, 499 F.2d 44, 47 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975); *Estate of Dorothy Sheldon*, 7 I.B.I.A. at 15. The Department of the Interior faithfully complied with that obligation in this case. Its decision that the testator intended the phrase "heirs of the body" in his will to exclude adopted children was not arbitrary or capricious. There is no basis for further review of that decision.

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of the remainder interest in the subject property that passed through the residuary clause of the testator's will. See note 2, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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